

public with the overlay and its operation.

(Bausback Aff. ¶ 10). These conditions make the overlay competitively neutral and ameliorate potential anti-competitive effects of dialing "disparities" of an area code overlay in New York City.

Enforcement of the anti-discrimination provisions of the central office code assignment guidelines and the availability of permanent local number portability prior to activation of the area code overlay also avoid the need for mandatory 10-digit dialing in all situations. In New York City, permanent number portability will be available as early as April 1998 (Bausback Aff. ¶ 11). The incumbent local exchange company (incumbent LEC) is not guaranteed retention of current number assignments. The market will determine the distribution (or redistribution) of existing number resources. Thus, competitors will have equal access to existing number resources and the development of competition will not be impeded by an overlay. Further, number pooling will be available as an additional safeguard. Barring technical constraints, number pooling may be implemented at or about the same time as permanent number portability (Bausback Aff. ¶ 12).

The Commission expressed concern that CLECs will receive most number assignments from the new area code rather than the existing area code, making the new area code less attractive (Local Competition Second Report and Order at 47330, para. 287; Pennsylvania Order para. 19). This premise is not universally applicable. Although CLECs apparently were unable to

obtain central office codes in many of the approximately 100 rate centers in the Pittsburgh areas (Pennsylvania Order para. 21), the low number of rate centers in Manhattan allows all competitors to obtain central office codes in all rate centers (Bausback Aff. ¶ 8).<sup>9</sup> Moreover, number pooling will ensure that all carriers will have equal access to available numbers in the existing area code regardless of size and timing of market entry (Bausback Aff. ¶ 13)

The CLECs have substantially lower number utilization rates than the incumbent LEC (15% compared with a number utilization rate of 80% for the incumbent LEC) and more available telephone numbers in proportion to their market shares (Bausback Aff. ¶ 14 and ¶ 15).<sup>10</sup> Therefore, CLECs in New York City are not at a competitive disadvantage with respect to number resources. In any event, the new area code is likely to receive rapid usage by both the CLEC and incumbent LEC customers in light of the growing demand for telephone numbers in New York City (Bausback Aff. ¶ 7).<sup>11</sup> This demand will quickly eliminate any perceived anti-competitive effects of an overlay.

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<sup>9</sup> There are three rate centers in Manhattan (Bausback Aff. ¶ 8).

<sup>10</sup> Although the incumbent LEC has more numbers available on an absolute basis than does its competitors, it actually has fewer numbers in proportion to its market share (Bausback Aff. ¶ 14).

<sup>11</sup> There is no evidence that CLECs will disproportionately have to meet number demand by receiving number assignments in the new area code. In fact, CLECs are more likely to experience customer growth by customers changing carriers; and number portability will allow these customers to retain their current telephone numbers (Bausback Aff. ¶ 13).

In sum, the overlay plan approved by the NYPSC furthers competition and addresses the anti-competitive issues raised by the Commission while providing a longer number relief period than a geographic split. Mandatory 10-digit dialing, however, would not only inconvenience the public but it could impede efficient number administration. Perhaps most importantly, it would not further the Commission's competitive goals. Thus, the Commission's 10-digit dialing requirement should be revoked.

II. The Commission's Jurisdiction To Administer The North American Numbering Plan Does Not Extend To Requiring 10-Digit Dialing For Intrastate Calls

The Local Competition Second Report and Order states that 10-digit dialing is required in area code overlay situations to ensure dialing parity amongst customers in the old area code and customers in the new area code (Local Competition Second Report and Order at 47330, para. 286-287).<sup>12</sup> The Commission relies on section 251(e)(1) of the Communications Act of 1934, as amended by the Telecommunications of 1996 (the Act), in requiring 10-digit dialing when an area code overlay is implemented (47 U.S.C. § 151 et. seq.). The Act gives the Commission exclusive jurisdiction with respect to the North American Numbering Plan. Specifically, the Act authorizes the Commission to "administer telephone numbering and to make such numbers available on an equitable basis." Section 251(e)(1).

The Commission's 10-digit dialing requirement, however, is neither the type of activity envisioned for number

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<sup>12</sup> This requirement is implemented by 47 C.F.R. § 52.19(c)(3).

administration nor necessary for the equitable distribution of telephone numbers under the North American Numbering Plan. The Commission's jurisdiction with respect to number administration involves the "coordination and distribution" of telephone numbers and does not extend to dialing parity for intrastate calls. See, California v. FCC, 124 F.3d 934 (8th Cir. 1997) [Wherein the Court held that the Commission exceeded its jurisdiction in promulgating dialing parity rules for intraLATA calls].

The Act requires local exchange carriers (LECs) to provide dialing parity (Section 251(b)(3)). Both the Commission and the states share a common interest in seeing that LECs provide dialing parity -- the Commission with respect to interstate communications and the states with respect to intrastate communications. See, Section 271(e)(2)(b). As stated in our Petition, "there is no indication that Congress intended that the Commission would have authority over dialing parity for intrastate calls, in contrast to other provisions of the Act giving the Commission jurisdiction over number portability (251(b)(2)) and numbering administration (251(e)(1)) (Petition p. 5)." Nothing in the Act grants the Commission intrastate jurisdiction over dialing parity. California v. FCC, 124 F.3d 934, 941-942.

Further, the Act expressly reserves the states' jurisdiction over practices in connection with intrastate communications. The Act specifically states:

that nothing [in the Act] shall be construed to apply or to give the Commission jurisdiction with respect to...charges, classifications, practices, services, facilities, or regulations for or in

connection with intrastate communication service by wire or radio of any carrier... (emphasis added).

(Section 152(b)). Such practices include local dialing.

As the Eighth Circuit stated in Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), section 152(b) "fences" off the matters within its scope from the Commission. In the Court's words:

[w]hile subsection 251(b)(3) requires dialing parity at the intrastate level, it makes no reference whatsoever to the FCC. See, 47 U.S.C.A. §251(b)(3). Without a clear grant of authority to the FCC, Section 2(b) stands as a fortification against the Commission's intrusion into telecommunications matters that are intrastate in character.

California v. FCC, at 940. Although the court in California v. FCC limited its holding to intraLATA calls because petitioners did not request relief beyond the intraLATA aspects of the Commission's dialing parity rules, the court's rationale is equally applicable to intrastate calls generally and particularly to calls covered by 47 C.F.R. § 52.19.

The application of the Commission's 10-digit dialing rules "would inappropriately override state regulators' authority to decide what intrastate calling arrangements are best suited to the public interest within their states." U.S. v. Western Elec. Co., Inc., 569 F. Supp. 1057, 1109 (D.D.C. 1982), aff'd sub nom, California v. U.S., 464 U.S. 1013 (1983). The Commission's dialing parity rules (47 C.F.R. §§ 51.205 - 51.215) are no longer valid with respect to intraLATA calls under the holding in California v. FCC. Inasmuch, as Section 152(b) of the Act preserves intrastate jurisdiction to the states, imposing mandatory 10-digit dialing on interLATA intrastate calls is

equally beyond the Commission's jurisdiction. Thus, the Commission lacks authority to impose dialing parity rules governing intrastate calls as a condition to an area code overlay.

#### CONCLUSION

For the reasons stated herein, and in our October 7, 1996 Petition for Reconsideration, the Commission should vacate its rules that impose 10-digit dialing for intrastate calls in areas served by area code overlays.

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